



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
FREEDOM OF INFORMATION ACT BRANCH
Washington, D.C. 20570

Via email

December 8, 2021

Re: FOIA Request NLRB-2019-000148 (Remand from DLC-NLRB-2021-001455)
First Production of Records

Dear Marian Massey (Fisher & Phillips)

This is in response to the appeal determination issued by the Chief FOIA Officer on October 29, 2021 in NLRB-DLC-2021-001455, remanding in part my July 14, 2021 FOIA determination in NLRB-2021-001006, which initially sought:

1. Any and all documents relating to or reflecting on the case entitled Station Casinos LLC, et al., filed in Region 28 of the NLRB, bearing Case Number 28-CA-185945, including but not limited to: case file documents; formal documents; nonconfidential information in the case file; newspaper clippings; arbitrators' decisions; transcripts from other proceedings; advice and appeals memoranda; and settlement agreement terms.

2. Any and all documents relating to or reflecting on the case entitled Station Casinos LLC, et al., filed in Region 28 of the NLRB, bearing Case Number 28-CA-188543, including but not limited to: case file documents; formal documents; nonconfidential information in the case file; newspaper clippings; arbitrators' decisions; transcripts from other proceedings; advice and appeals memoranda; and settlement agreement terms.

3. Any and all documents relating to or reflecting on the case entitled Station Casinos LLC, et al., filed in Region 28 of the NLRB, bearing Case Number 28-CA-188547, including but not limited to: case file documents; formal documents; nonconfidential information in the case file; newspaper clippings; arbitrators' decisions; transcripts from other proceedings; advice and appeals memoranda; and settlement agreement terms.

4. Any and all documents relating to or reflecting on the case entitled Station Casinos LLC, et al., filed in Region 28 of the NLRB, bearing Case Number 28-CA-190629, including but not limited to: case file documents; formal documents; nonconfidential information in the case file; newspaper clippings; arbitrators' decisions; transcripts from other proceedings; advice and appeals memoranda; and settlement agreement terms.

With my July 14, 2021 FOIA determination, you were provided 133 pages of formal non-investigatory records from the four requested case files. Notwithstanding that the four

cases were closed, the investigatory records were withheld pursuant to FOIA Exemption 7(A) because of their relationship to the open and still ongoing proceedings in NLRB Case 28-CA-228052. As I explained, FOIA law permits such withholding under *New England Med. Ctr. Hosp. v. NLRB*, 548 F.2d 377, 385-86 (1st Cir. 1976), even if a case is closed, where disclosure could be expected to interfere with a related pending proceeding. Based on my initial review and consult with the Regional personnel at that time, I determined that release of any investigatory records in the four closed cases could reasonably interfere with the ongoing proceeding in Case 28-CA-228052.

You appealed my determination and requested the records be released, claiming that because the four cases were closed in May 2017 following compliance with a settlement agreement, it was “tenuous at best” that release of records would reasonably interfere with the pending enforcement proceeding. The Chief FOIA Officer denied your appeal, in part, concluding that Exemption 7(A) was properly applied with respect to a majority of the records withheld, but granted it to the extent that “there may not be harm in releasing certain records” from the four case files. Your appeal was remanded to the FOIA Branch and assigned FOIA NLRB-2022-000148, to conduct a “fresh analysis as to whether or not releasing any responsive records could reasonably be expected to interfere with enforcement proceedings, as well as whether any other exemption under the FOIA should apply.”¹

I have determined, following an independent review of the previously withheld records, that there would be little or no harm to the open Case 28-CA-228052 proceeding if we release an additional 912 pages of records, which are attached. These records include correspondence between Region 28 staff and the parties in the cases, copies of subpoenas and payroll records, and lists of employer monetary reimbursements to employees required by a settlement agreement. Redactions have been made to portions of the records pursuant to FOIA Exemption 6, which pertains to information the release of which would constitute a clearly unwarranted invasion of personal privacy and FOIA Exemption 7(C), which pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6) and (7)(C).

However, I adhere to my prior determination regarding other investigatory records in the case file, including position statements and evidence submitted by the Union, and will continue to withhold these records under Exemption 7(A) at this time. Disclosure of these records could cause harm to the ongoing prosecution of Case 28-CA-228052 by providing access to records not otherwise available in ULP proceedings and thus enabling your client to tailor a defense to the violations alleged or otherwise obtain an unfair litigation advantage by premature disclosure. See *Alyeska Pipeline Serv. Co. v. EPA*, 856 F.2d 309, 312-13 (D.C. Cir. 1988) (premature disclosure would afford insights into the enforcing agency’s strategy and evidence); *Ehringhaus v. FTC*, 525 F. Supp.

¹ A point of clarification: the appeal response letter misstated that the hearing in Case Nos. 28-CA-228052 had concluded. In fact, as you know, the hearing, which commenced on August 3, 2021, was temporarily adjourned and is now scheduled to resume on January 10, 2022.

21, 23-24 (D.D.C. 1980) (premature disclosure would impair future law enforcement proceedings). The FOIA is not intended to function as a private discovery tool for litigants. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224, 236 (1978).

Please be advised that I am continuing to review additional records identified on remand, including email communications containing collective bargaining proposals between the parties, employer/company position statements and evidence submitted by your client's prior counsel, to determine their release consistent with the principles of Exemption 7(A), and will provide a second production shortly.

In addition to Exemption 7(A), there are internal casehandling records that should still be withheld pursuant to Exemption 5, 5 U.S.C. § 552(b)(5), including Board Agent casehandling logs, subpoena applications, draft copies of complaints and settlement agreements, and internal investigatory memoranda containing summaries of the case allegations and legal analyses of the issues raised, and recommendations in the cases.

Exemption 5 allows agencies to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," and covers records that would "normally be privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997). The deliberative process and the attorney work-product privileges are two of the primary privileges incorporated into Exemption 5.

The deliberative process privilege protects the internal decision-making processes of government agencies to safeguard the quality of agency decisions. *Competitive Enter. Inst. v. OSTP*, 161 F. Supp.3d 120, 128 (D.D.C. 2016). The basis for this privilege is to protect and encourage the creative debate and candid discussion of alternatives. *Jordan v. U.S. Dep't. of Justice*, 591 F.2d 753, 772 (D.C. Cir.1978). Two fundamental requirements must be satisfied before an agency may properly withhold a record pursuant to the deliberative process privilege. First, the record must be predecisional, *i.e.*, prepared in order to assist an agency decision-maker in arriving at the decision. *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). Second, the record must be deliberative, *i.e.*, "it must form a part of the agency's deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Judicial Watch, Inc. v. FDA*, 449 F.3d at 151 (quoting *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). To satisfy these requirements, the agency need not "identify a specific decision in connection with which a memorandum is prepared. Agencies are . . . engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process." *Sears, Roebuck & Co.*, 421 U.S. at 151 n.18 (1975). Moreover, the protected status of a predecisional record is not altered by the subsequent issuance of a decision, *see, e.g., Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979); *Elec. Privacy*

Info. Ctr. v. DHS, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005) or by the agency opting not to make a decision. See *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995), *aff'd*, 76 F.3d 1232 (D.C. Cir. 1996).

The attorney work-product privilege protects records and other memoranda that reveal an attorney's mental impressions and legal theories that were prepared by an attorney, or a non-attorney supervised by an attorney, in contemplation of litigation. See *United States v. Nobles*, 422 U.S. 225, 239 n.13 (1975); *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947). The attorney work-product privilege extends to records prepared in anticipation of both pending litigation and foreseeable litigation and even when no specific claim is contemplated at the time the attorney prepared the material. *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992). Furthermore, the privilege protects any part of a record prepared in anticipation of litigation, not just the portions concerning opinions and legal theories, see *Judicial Watch v. U.S. Dep't of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005), and is intended to protect an attorney's opinions, thoughts, impressions, interpretations, analyses and strategies. *Id.*; see also *Wolfson v. United States*, 672 F. Supp.2d 20, 29 (D.D.C. 2009). See *Judicial Watch*, 432 F.3d at 371 (finding that an agency need not segregate and disclose non-exempt material if a record is fully protected as work product). Additionally, the protection provided by Exemption 5 protection for attorney work-product records is not subject to defeat even if a requester could show a substantial need for the information and undue hardship in obtaining it from another source. See *FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983). Finally, protection against the disclosure of work-product records continues even after litigation is terminated. *Id.*

Here, the withheld records meet the requirements for Exemption 5 protection under both the deliberative process and attorney work-product privileges. They are internal and predecisional. They reflect the views of the General Counsel and her Regional staff concerning the policies and strategies in the processing of the unfair labor practice cases. Since they analyze various legal theories and recommendations, these internal casehandling records clearly reflect the deliberative and consultative process of the Agency that Exemption 5 protects from disclosure. *Sears, Roebuck and Co.*, 421 U.S. at 150-52. Additionally, the records also contain attorney work-product, as they reflect the analysis and opinions of the General Counsel's staff created to assist superiors in their decision-making process in anticipation of possible litigation. Accordingly, the records are being withheld in their entirety.

The other investigatory records in the case file such as witness affidavits are being withheld in their entirety under FOIA Exemptions 6, 7(C), and 7(D), since their disclosure could constitute an unwarranted invasion of privacy and/or reveal a confidential source.

Exemption 6 permits agencies to withhold information about individuals in "personnel and medical and similar files" where the disclosure of the information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). *Am.*

Immigration Lawyers Ass'n v. Exec. Office for Immigration Review, 830 F.3d 667, 673 (D.C. Cir. 2016). The “files” requirement covers all information that “applies to a particular individual.” *Ayuda, Inc. v. FTC*, 70 F.Supp.3d 247,264 (D.D.C. 2014) (citing *U.S. Dep’t of State v. Wash. Post Co.*, 456 U.S. 595, 601-02 (1982)). “‘Similar files’ has been interpreted broadly to include ‘[g]overnment records on an individual which can be identified as applying to that individual.’” *Pavement Coatings Technology Council v. United States Geological Survey*, 2019 WL 7037527, *8 (D.D.C. Dec. 19, 2019) (quoting *Wash. Post Co.*, 456 at 602). See *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 198-199 (D.C. Cir. 2006) (Exemption 6 may exempt not just files, but personal information such as names and addresses). Exemption 7(C) permits agencies to withhold information compiled for law enforcement purposes where disclosure of the information “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C); *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989), see also *Brennan Center for Justice at New York University School of Law v. DOJ*, 2020 WL 1189091, *3-4, (D.D.C. Mar. 12, 2020) (reaffirming Exemption 7(C) imposes a “lower bar for withholding” than Exemption 6.).

Application of Exemptions 6 and 7(C) requires a two-part balancing test that considers: (1) whether there is a legitimate personal privacy interest in the requested information, and, if so; (2) whether there is a countervailing public interest in disclosure that outweighs the privacy interest. *Judicial Watch, Inc. v. Nat’l Archives & Records Admin.*, 214 F. Supp. 3d 43, 58 (D.D.C. 2016), *aff’d*, 876 F.3d 346 (D.C. Cir. 2017), citing *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004). With respect to the first factor, the Supreme Court has described Exemptions 6 and 7(C) as reflecting privacy interests in “avoiding disclosure of personal matters,” *Reporters Comm.*, 489 U.S. at 762, maintaining the “individual’s control of information concerning his or her person,” *id.* at 763, avoiding “disclosure of records containing personal details about private citizens,” *id.* at 766, and “keeping personal facts away from the public eye,” *id.* at 769. Consistent with these concerns, privacy interests have been recognized for individuals named in a law enforcement investigation, including third parties mentioned in investigatory files, as well as witnesses and informants who provide information during the course of an investigation. See *Rugiero v. U.S. Dep’t of Justice*, 257 F.3d 534, 552 (6th Cir. 2001); *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995); and *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 985 (9th Cir. 1985).

The records are exempt from disclosure under the above balancing test, and are, thus, being withheld. The withheld records are investigative files obtained by the Agency for the purpose of enforcing the National Labor Relations Act, and contain individuals’ names, addresses, and other identifying information that fit squarely within the types of privacy interests that Exemptions 6 and 7(C) were intended to protect from disclosure. By contrast, I perceive no countervailing public interest in disclosure. The public’s interest in disclosure depends on “the extent to which disclosure would serve the ‘core purpose of the FOIA,’ which is ‘contribut[ing] significantly to public understanding of the operations or activities of the government.’” *U.S. Dep’t of Def. v. Fed. Labor Relations*

Auth., 510 U.S. 487, 495 (1994) (emphasis in original), *quoting Reporters Comm.*, 489 U.S. at 775. As the Supreme Court further explained in *Nat'l Archives & Records Admin.*, 541 U.S. at 172, to defeat a privacy interest there must be some indication that the "public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake . . . [and that] the information is likely to advance that interest." No such public interest is evident here that outweighs the private interests identified above. For the foregoing reasons, the records are protected from disclosure under Exemptions 6 and 7(C).

In addition to Exemptions 6 and 7(C), Exemption 7(D) also applies. Exemption 7(D) permits an agency to withhold records or information compiled for law enforcement purposes that "could reasonably be expected to disclose the identity of a confidential source . . ." 5 U.S.C. § 552(b)(7)(D). A "source" is considered confidential if he or she "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred." See *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 172 (1993). Exemption 7(D) permits withholding any information furnished by a source that might disclose or point to his or her identity. See *Radowich v. U.S. Attorney, Dist. of Md.*, 658 F.2d 957, 960 n.10 (4th Cir. 1981).

One of the purposes underlying Exemption 7(D) is to "encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants' identities confidential." *United Technologies Corp. v. NLRB*, 777 F.2d 90, 94 (2d Cir. 1985). This is "particularly important to agencies, such as the NLRB, . . . [which] must depend on the information provided by the charging party and its witnesses" who are often the "sole source of the Board's information in unfair labor practice cases." *Id.* ("An employee-informant's fear of employer retaliation can give rise to a justified expectation of confidentiality."). Significantly, a source's identity can be withheld under Exemption 7(D) even if his or her identity is or becomes known through other means. See, e.g., *Jones v. FBI*, 41 F.3d 238, 248-49 (6th Cir. 1994); *Ferguson v. F.B.I.*, 957 F.2d 1059, 1068-69 (2d Cir.1992) (Exemption 7(D) protection is available even if the source has testified at a hearing or the information provided by the source has otherwise been made public); *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 491-92 (D.C. Cir. 1980); *Ortiz v. Dep't of Health and Human Serv.*, 70 F.3d 729, 733 (2d Cir. 1995); *United Technologies*, 777 F.2d at 95.

For the purpose of assessing fees, we have placed you in Category A, commercial use requester. This category refers to requests "from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation." NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(v). Consistent with this fee category, you "will be assessed charges to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought." 29 C.F.R. § 102.117(d)(2)(ii)(A). Charges for all categories of requesters are \$9.25 per quarter-hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

Seven hours of professional time was expended searching for and reviewing the requested material. Accordingly, please remit \$259.00.

Payment Instructions: Due to the COVID-19 pandemic and resulting widespread employee telework at the Agency's Headquarters offices, we are no longer accepting checks or money orders as payment at this time. To submit payment for your FOIA request, please use www.pay.gov. From the www.pay.gov home page, scroll down to the bottom left corner to select "Pay a FOIA Request." Click "See all options" and go to "Filter By Agency" to check the box for the National Labor Relations Board. Continue following instructions on the website. Please remember to include the Invoice Number, which is the NLRB FOIA Case No., and the amount you intend to pay. Further, please be advised that all FOIA payments must be paid in full before any future FOIA requests are processed.

You may contact Ed Hughes, the FOIA Attorney who processed your request, at (202) 273-1773 or by email at ed.hughes@nrlb.gov, as well as the Agency's FOIA Public Liaison, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Attorney, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency's FOIA Public Liaison is:

FOIA Public Liaison
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: FOIAPublicLiaison@nrlb.gov
Telephone: (202) 273-0902
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
Email: ogis@nara.gov
Telephone: (202) 741-5770
Toll free: (877) 684-6448
Fax: (202) 741-5769

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You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at:

<https://foiaonline.regulations.gov/foia/action/public/home> or by mail or email at:

Nancy E. Kessler Platt
Chief FOIA Officer
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: DLCFOIAAppeal@nrlrb.gov

Any appeal must be postmarked or electronically submitted within 90 calendar days of the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the FOIA Attorney, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

/s/ *Synta E. Keeling*

Synta E. Keeling
Freedom of Information Act Officer

Attachment: (912 pages – three PDFs: Final Case Records, Final Backpay Records, and Final Payroll Records)